No. 72-1649

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

GEORGE WESTERBERG, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED, *Petitioner*,

v.

THE DISTRICT COURT IN AND FOR THE SECOND JUDICIAL DISTRICT, AND THE HONORABLE NEAL HORAN AND THE STATE GRAND JURY, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Colorado, entered in the above-entitled original proceeding on February 20, 1973.

OPINION BELOW

The opinion of the Supreme Court of the State of Colorado (Appendix B, *infra*, pp. 2a-5a) is not yet officially reported, but is unofficially reported at 506 P.2d 746.

JURISDICTION

The judgment of the Supreme Court of the State of Colorado (Appendix A, *infra,* p. 1a) was entered on February 20, 1973. A timely petition for rehearing was denied on March 12, 1973 (Appendix C, *infra,* p. 6a), and this petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether state grand jury witnesses (for whom the government obtained transactional immunity) are entitled to invoke the exclusionary rule formulated under the Fourth and Fourteenth Amendments to the United States Constitution by moving to suppress wiretapping evidence intended for use in questioning them before the grand jury, on the ground that the evidence was the product of illegal searches and seizures.[1]

2. Whether, if such witnesses are not entitled to invoke the exclusionary rule, they, at least, are entitled to assert their rights under the Fourth and Fourteenth Amendments by seeking a judicial order, without becoming subject to contempt proceedings, a) permitting them to refuse to answer grand jury questions which are based on such illegal searches and seizures, or, at a minimum, b) making available to them the record (or portions thereof) in the wiretap authorization case which would allow them more effectively to choose—upon advice of counsel—between testifying and being cited for contempt.

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[1] This question substantially conforms to the question framed by the Solicitor General in the petition for a writ of certiorari in *United States* v. *John P. Calandra,* No. 72-734, *certiorari granted* February 20, 1973.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the Constitution of the United States, Section 1, provides in pertinent part:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . ."

STATEMENT OF THE CASE

On May 1, 1972, a State Grand Jury was impaneled by the Honorable Neal Horan, Chief Judge of the District Court in and for the Second Judicial District, State of Colorado (R. 23; Appendix D, *infra,* p. 13a).[2] Petitioner Westerberg and various other witnesses were subpoenaed to appear and testify before this grand jury on May 10, 1972 (R. 8).

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[2] "R." refers to the certified record in this original proceeding in the Supreme Court of the State of Colorado, which is being lodged with the Clerk of this Court. Appendix D ("App. D"), *infra,* contains a copy of pertinent pleadings and other papers in prior and related proceedings before the Supreme Court of the State of Colorado, Justice James K. Groves thereof, and the District Court in and for the Second Judicial District. (Such latter Court is also referred to in the record as the District Court in and for the City and County of Denver (compare the R. and App. references above).)

Previously, by order of Colorado Supreme Court Justice James K. Groves, dated April 14, 1971, Westerberg and two of the other subpoenaed witnessed had been provided the statutorily-required notice that 1) upon the application of the State Attorney General, Justice Groves had issued an electronic surveillance order which was in effect for a period of 30 days commencing on January 6, 1971, and thereafter, had issued an extension order for electronic surveillance which was in effect for a period of 30 days; and 2) telephonic communications had been intercepted during the period January 18, 1971—March 7, 1971 (App. D, *infra*, pp. 7a-8a).

On or about May 10, 1972, and prior to their appearance before the grand jury, Westerberg and 13 other subpoenaed witnesses[3] filed a motion in the District Court in and for the Second Judicial District (hereinafter, "District Court") for an order suppressing evidence obtained by electronic surveillance, prohibiting the State Attorney General from disclosing the contents of such surveillance to the grand jury, and from questioning any of them based upon such evidence (R. 8.), all on the ground, *inter alia*, that the electronic

[3] The 13 other movants included Anthony Mulligan, who had been one of the specified recipients of Justice Grove's April 14, 1971 statutory notice; each of the movants alleged that he had been engaged in telephone conversations during the period and on the telephones specified in Justice Grove's notice and, therefore, had reason to believe that his communications had been intercepted and recorded without his knowledge or consent (App. D, *infra*, p. 10a, para. 4). At a hearing on the motion, the Attorney General stipulated that during the period of the interception, communications of movants Westerberg, Mulligan, Van Portfliet and Nelson were in fact overheard, and further represented that he was as yet unable to state whether or not other witnesses had been overheard (R. 8, para. 2; App. D, *infra*, p. 14a, para. 4).

surveillance referred to "violated the rights of each of the above-named witnesses guaranteed by the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States" and "that as witnesses before the Grand Jury, the Petitioners may have no other opportunity to raise the issue of the violation of their Constitutional rights" (App. D, *infra,* pp. 9a-11a, 13a (para. 3); R. 8). A hearing was conducted by Chief Judge Horan on the question of whether the witnesses had standing to challenge the wiretap evidence prior to appearing to testify before the grand jury. Chief Judge Horan ruled that the witnesses had such standing, ordered a hearing to be held on the legality of the electronic surveillance conducted, and further ordered the production of the record in the previously held surveillance authorization proceeding, including the applications for and orders authorizing such surveillance. (R. 9, para. 3; App. D, *infra,* pp. 14a (para. 5), 12a.)

The Attorney General sought relief from the District Court's order by filing in the Supreme Court of the State of Colorado a petition for a writ of prohibition directed against the District Court (App. D, *infra,* pp. 13a-15a). On June 8, 1972, the Colorado Supreme Court issued a show cause order staying further proceedings in the District Court (App. D, *infra,* p. 16a). And on August 28, 1972, the Colorado Supreme Court issued a writ of prohibition, together with an opinion referring to the witnesses' claim "that important Fourth Amendment rights should be promptly vindicated" but concluding that "the witnesses are not entitled to a suppression hearing, and the district court is not to conduct a suppression hearing at this time." *People, ex rel. Dunbar* v. *District Court,* — *Colo.* —, 500 P.2d 819 (App. D, *infra,* pp. 17a-19a). (R. 9, para. 4.)

Subsequent to the Colorado Supreme Court's ruling in *People, ex rel. Dunbar,* Westerberg and the other subpoenaed witnesses sought disclosure of the applications, orders and intercepted conversations by a motion for discovery directed to Justice Groves (App. D, *infra,* pages 20a-23a).[4] By order dated September 22, 1972, Justice Groves denied the motion (R. 16-19).

Thereafter, the witnesses, including Westerberg, were again directed to appear before the grand jury on October 10, 1972. Upon his appearance before the grand jury, each of the witnesses refused to answer questions on the basis of his Fifth Amendment privilege against self-incrimination. In addition, each of the witnesses refused to testify on the ground that the question was based on information obtained in violation of his rights as guaranteed by the Fourth Amendment to the United States Constitution (R. 9, 23). The Attorney General then applied to the District Court for grants of immunity with respect to 13 of the witnesses, including Westerberg. Immunity was granted to each of the witnesses, including Westerberg, on October 24,

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[4] In their Motion, Westerberg, et al., claimed,

> "that if the electronic surveillance conducted by the state was unlawful, either because the order was not properly obtained or because the surveillance was not conducted in accordance with the order, the movants have a right not to be compelled to answer questions based upon information directly or indirectly obtained from such unlawful electronic surveillance, such right being guaranteed by the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States . . . ."

and,

> "that it is impossible for the movants to make an intelligent judgment as to whether the electronic surveillance was valid unless the information sought by them in this motion is made available to them." (App. D, *infra,* p. 22a.)

1972, and the witnesses were ordered to reappear before the grand jury on November 6, 1972. The District Court's "Order Compelling Testimony Pursuant to a Grant of Immunity" expressly refrained from "ruling concerning the refusal of the witnesses to testify on the ground that the questions are based on information obtained in violation of the witness's rights as guaranteed by the *Fourth Amendment* to the Constitution of the United States." (R. 9 (para. 7, 8), 20-25.) (Emphasis added.)

On the date of their reappearance before the grand jury, and prior to any of the witnesses being called to testify, Westerberg filed in the District Court a "Motion For Hearing on Question of Fourth Amendment Violation" wherein he prayed for an order as to whether he would be permitted to refuse to answer grand jury questions based upon the contents of intercepted communications, and the production of the applications and orders which resulted in such interceptions (R. 9-10, 26-27). Based upon the Colorado Supreme Court's ruling in *People ex rel. Dunbar,* the District Court denied the motion, but stayed the witnesses' appearances before the grand jury in order to afford Westerberg an opportunity to seek relief in the State Supreme Court (R. 10 (sic), 31).

On November 9, 1972, Westerberg, individually and on behalf of the other similarly situated subpoenaed witnesses, brought the original proceeding in the Colorado Supreme Court resulting in the judgment, review of which is sought here. In that Court, in his brief, petitioner characterized his action as follows:

> "The Petitioner has before the Court his petition filed in his own behalf and on behalf of others similarly situated requesting the Court to exer-

> cise its supervisory authority over the Respondent Court, and by such action as it may deem appropriate, insure protection of the rights of those concerned as are guaranteed by the Fourth and Fourteenth Amendments to the Constitution of the United States." (R. 28.)

In his petition, Westerberg requested the Colorado Supreme Court to insure that he "receives a hearing on the question of whether he may be compelled to testify before the State Grand Jury concerning matters arising out of a violation of the Fourth Amendment to the Constitution of the United States" and that he be provided copies of the applications and orders authorizing the electronic surveillance (R. 1). In his petition (R. 1-5) and supporting brief (R. 28-38), Westerberg reviewed the prior and related proceedings in the District Court and the Colorado Supreme Court, as well as before Justice Groves, and stated that the current facts and requested relief were "postured differently" (R. 32) from those involved in *People ex rel. Dunbar,*[5] stating:

> "The witnesses have appeared and refused to testify for reasons predicated [sic] upon their rights under the Fourth and Fifth Amendments to the Constitution of the United States. They have each been granted 'immunity' and directed to reappear before the respondent Grand Jury. Each who persists in refusing to answer questions faces the risk of contempt citations and public proceedings even if the refusal is properly asserted under the Fourth Amendment. The decision whether to invoke a constitutional right must be made without access to information withheld

[5] He reiterated, however, that "if petitioner is entitled to the applications and orders and tapes only at a suppression hearing, then petitioner is entitled to that hearing as well and now." (R. 35.)

> though readily available. A sense of fairness under such circumstances seems obscure at best. The allegations of illegality, though not denied, remain unspecific because the materials from which specifics can be drawn has been denied the witnesses by order of a justice of this Court" (R. 32-33).
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> * * * * * * * * *
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> "The apparent alternative to such a reasonable respect for human rights is to orchestrate a contempt situation. No issue will then be present which is not now before the Court. No useful purpose is to be served by compelling such an unnecessary step." (R. 37-38.)[6]

Following the filing of the petition, and pursuant to order of the court, the Attorney General filed an answer on December 17, 1972 (R. 6, 8-27). Finally, on February 20, 1973, the Colorado Supreme Court issued its order and opinion—the Chief Justice and one other Justice dissenting[6a]—discharging the rule to show cause and denying the relief requested by petitioner, thereby leaving intact the requirement that Westerberg and similarly situated witnesses answer the grand jury's questions, without regard to their Fourth and Fourteenth Amendment claim, or subject themselves

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[6] While petitioner, for the reasons he asserted above, could allege in only conclusory form that electronic surveillance was conducted without benefit of a lawful order, that the applications for such surveillance were insufficient to support a finding of probable cause, that the orders authorizing such surveillance were improper (R. 5), and "that after numerous court proceedings, the Attorney General has not denied the allegations" (R. 4), he did make the specific claim that Justice Groves had no jurisdiction to issue the surveillance order, and, therefore, "in the absence of a lawful order, the wiretapping is as unlawful as any electronic surveillance undertaken in the absence of an order where court approval is required" (R. 4).

[6a] Also, Justice Groves did not participate (R. 44).

to contempt proceedings. (Apps. A, B, *infra,* pp. 1a-5a). The Court squarely faced the federal constitutional question raised by petitioner, stating:

> "The question before us is limited to search and seizure issues under the Fourth Amendment and does not involve self-incrimination under the Fifth Amendment."
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> * * * * * * * * *
>
> "Constitutional issues are before us which involve the balancing of conflicting Constitutional rights and procedures. The petitioners would have us look solely to the Fourth Amendment right of privacy and the right of every person to be protected against unreasonable searches and seizures. The Attorney General points to the function of the grand jury as a charging body and the need to grant the grand jury freedom in its investigation of crime. He contends that to require a suppression hearing when there has been a court-authorized wiretap, before a grand jury witness can be asked a question, would seriously impede the effective use of the grand jury." (App. B, *infra,* pp. 3a, 4a.)

The Colorado Supreme Court, in its opinion, went on to discuss conflicting results which had been reached by two United States Courts of Appeals—*Cali* v. *United States,* 464 F.2d 475 (1st Cir. 1972); *United States* v. *Calandra,* 465 F.2d 1218 (6th Cir. 1972), *certiorari granted* February 20, 1973 (No. 72-734)[7]—and con-

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[7] Referring to the *Calandra* case, the Colorado Supreme Court stated:

> "The Sixth Circuit, however, did not find that a contempt citation was a necessary prerequisite to a right to a hearing on his motion to suppress after he was subpoenaed and claimed that the questions which the grand jury propounded were based upon unlawful electronic surveillance. . . . The Sixth Circuit's opinion is based on the deterrence of unlawful electronic surveillance." (App. B, *infra,* p. 5a.)

cluded that "the reasoning of the First Circuit is persuasive." (App. B, *infra*, p. 5a.) The Colorado Supreme Court concluded:

> "To permit every witness who appears before a grand jury to file a motion to suppress and have it determined before he testifies would be to frustrate the grand jury process. Adequate protection is afforded the witness by the requirement that the Court examine all the facts before imposing a contempt sanction." (App. B, *infra*, p. 5a.)

Petitioner filed a timely petition for rehearing in the Colorado Supreme Court claiming that "the posture which this Court has apparently adopted may be construed as a determination that the rights of a grand jury take precedence over the rights of an individual even though the right in question is one guaranteed by the Constitution of the United States." The petition for rehearing was denied by the Colorado Supreme Court on March 12, 1973 (App. C, *infra*, p. 6a).

REASONS FOR GRANTING THE WRIT

I. There is Already Pending Before This Court a Substantially Identical Issue, on a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. In Addition, the Decision of the Supreme Court of Colorado has Established a Conflict Between Decisions of a Highest State Court and a United States Court of Appeals Concerning a Substantial Federal Question Involving the Construction and Application of the Federal Constitution.

On February 20, 1973, this Court granted certiorari in *United States* v. *John P. Calandra*, No. 72-734, to review an issue which is substantially identical to the issue raised in the instant case.[8]

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[8] The *Calandra* case is awaiting argument next Term.

Calandra also involves the effort by a grand jury witness, for whom transactional immunity was to be made available, to obtain a hearing and ruling on a motion to suppress evidence seized, following the issuance of a warrant, allegedly in violation of Fourth Amendment rights. Like the initial decision by the District Court in the instant case, the federal district court held that Calandra was entitled to "litigate the question of whether the evidence which constitutes the basis for the questions asked of him before the grand jury has been obtained in a way which violates the Constitutional protection against unlawful search and seizure." The court of appeals affirmed, holding that the District Court had properly entertained the suppression motion and that the Fourth Amendment exclusionary rule may be invoked by a grand jury witness as a bar to questioning based on an illegal search and seizure. The court discussed "the balance which must be struck" between "the interest of unencumbered inquiry and the efficient administration of justice" and "the importance which society attaches to the protection of the Fourth Amendment guarantee of privacy". The court stated:

> "While the importance of the speedy and efficient administration of criminal justice must not be understated in this period of overloaded dockets, it is not at all clear that the procedure approved by [Federal District] Judge Battisti would unduly burden the functioning of the grand jury. Certainly, it was his view as a district judge that it would not.[9] We concur in that view. This is particularly so in the instant case as the alter-

[9] In the instant case, apparently, Chief Judge Horan, of the District Court, who impaneled the grand jury yet subsequently ordered a suppression hearing to be conducted (App. D, *infra*, p. 12a), was of the same view. (Footnote supplied.)

native to the procedure used below is the raising of the Fourth Amendment through a contempt proceeding, which would, it would seem, be more disruptive.

* * * * * * * * *

"Furthermore, it is important to emphasize that we deal with a fundamental constitutional claim[10] that is ripe. Calandra's right to privacy has been violated. As a direct result he finds himself before the grand jury to be asked questions which are the fruit of the intrusion upon his privacy. Given the immunity device, his claim is not one which will be vindicated in the criminal process. Absent the opportunity to raise the claim at this stage in the proceedings Calandra's opportunity for redress is severely limited and at the same time the very substantial incentive for law enforcement officials to combine the illegal search with a grant of immunity at the grand jury stage is unrestrained." (Pet. in No. 72-734, pp. 21, 23.)

The court of appeals also referred to the motivation underlying the Fourth Amendment's deterrence purpose by quoting from Justice Brandeis' opinion in *Olmstead* v. *United States,* 277 U.S. 438, as follows:

"Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole

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[10] This Court has referred to the Fourth Amendment in the following terms:

" 'The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment —is basic to a free society.' *Wolf* v. *Colorado,* 338 U.S. 25, 27. . . . This right has most recently received enunciation in *Camara* v. *Municipal Court,* 387 U.S. 523. 'The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.' At 528." Mr. Justice Clark in *Berger* v. *New York,* 388 U.S. 41, 53.

(Footnote supplied.)

> people by its example. . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become law unto himself; it invites anarchy." (Pet. in No. 72-734, p. 22.)

The instant case involves the same interests and considerations as those currently before this Court in *Calandra,* and could, therefore, appropriately be reviewed at the same time. Moreover, it is respectfully submitted, by granting the writ here as well, the distinguishing facts of the instant case—a *state* grand jury witness seeking to suppress *wiretap* evidence—would serve to *assist* the Court in considering the common constitutional issue[11] within a desirably broad and timely framework. Indeed, as Mr. Justice Powell stated for the Court, last Term, referring to "the employment by Government of electronic surveillance":

> "There is, understandably, a deep-seated uneasiness and apprehension that this capability will be used to intrude upon cherished privacy of law-abiding citizens." (*United States* v. *United States District Court,* 32 L Ed 2d 752, 763.)[12]

And it has been forecast that the "legitimation" provided by title III of the Omnibus Crime Control and

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[11] These two factual distinctions do not, of course, affect the presence of the constitutional issue in the instant case. *Mapp* v. *Ohio,* 367 U.S. 643 (exclusionary rule enforceable against the States through the Fourteenth Amendment); *Katz* v. *United States,* 389 U.S. 347 (eavesdropping carried on by electronic means, with or without a physical intrusion, constitutes a "search and seizure" within the meaning of the Fourth Amendment).

[12] This Court has emphasized that the inherently broad intrusion of electronic eavesdropping makes the need for the Fourth Amendment's particularity requirements "especially great". *Berger* v. *New York,* 388 U.S. 41, 56.

Safe Streets Act of 1968[13] will increase the incidence of such intrusions at the state level. H. Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of Law and Order,* 67 Mich. L. Rev. 455, 477-480 (1969).

The Colorado Supreme Court's resolution of the federal constitutional issue, of course, conflicts with that of the United States Court of Appeals for the Sixth Circuit, in *Calandra.* It also conflicts with the views of two judges (Adams, Hastie, JJ.), who chose to reach the constitutional issue in *In re Egan,* 450 F.2d 199 (3d Cir. 1971), *aff'd* 408 U.S. 41,[14] and with the

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[13] P. L. 90-351, 18 U.S.C. §§ 2510, *et seq.*

[14] The Third Circuit in *In re Egan, supra,* held that Section 802 of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. § 2515) establishes a rule of evidence permitting a grand jury witness to move to suppress wiretap evidence intercepted in violation of the statutory requirements. *Two judges (Adams, J. in an opinion joined by Hastie, C.J.) also relied separately on the Fourth Amendment* (as well as 18 U.S.C. § 2518(10)(a)). *In re Egan* was affirmed by this Court on the more limited basis of the civil contempt statute, 28 U.S.C. § 1826(a), respondents having already been subjected to contempt proceedings in that case.

With regard to the consideration of efficiency of grand jury investigations, there was stated the following in the two opinions for the majority of the court of appeals:

> "In the context of electronic surveillance, it is unlikely that hearings such as requested here would become a major interference with efficient grand jury investigations. Sister Egan is not asking that the grand jury be prevented from continuing its investigations or from returning an indictment against anyone found to have violated federal law. . . .
>
> "We assume that the Government will attempt to conduct surveillance within statutory and constitutional limits, and that only in a slight number of cases will there be a violation of the rules governing wiretapping. Thus, when the allega-

dictum of the D.C. Circuit in *In re Evans,* 452 F.2d 1239, 1246 (D.C. Cir. 1971), *cert. denied,* 408 U.S. 930. This conflict between a highest state court and a federal

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tion of illegal surveillance is made in most cases the Government will simply represent to the court that no electronic surveillance has been employed by the Government. In a lesser number of cases the Government will produce in court the warrant by which it proceeded, and a brief inquiry will demonstrate that the warrant was properly obtained and that the surveillance did not exceed the authority of the warrant. Only in a minimal number of cases do we expect that the Government will be found to have conducted surveillance in violation of the statute and in these cases the hearing will not be overly complicated or lengthy, because the primary matter of inquiry would be whether the Government can demonstrate an independent basis, aside from the illegal surveillance, upon which to justify the questions propounded before the grand jury." 450 F.2d at 216 (Opinion of Adams, J.)

• • •

"I do not believe that the countervailing costs in the form of possible interference with grand jury procedures, will outbalance these benefits. Only a very small percentage of witnesses called before grand juries are hostile to the government's case. Even if all future hostile witnesses stand mute and raise a Section 2515 issue, presumably there will have been no wiretaps at all in a very high percentage of those cases, and a contempt hearing will take no longer than the prosecutor's representation to that effect. Only where there actually has been a wiretap will a hearing be in any way extended. In those instances where the wiretap has been duly authorized, the hearing should generally be relatively brief. I would expect that the percentage of unauthorized wiretaps will be extremely low, especially under the rule we adopt, and that the need for extended hearings will be proportionately slight. In the unlikely event, however, that the number of such cases is higher than I expect, the increased burden on the operation of grand juries will be more than offset, in my opinion, by the increased need for a prophylactic rule which such a disregard for the law would evidence." 450 F.2d at 220-21 (Opinion of Rosenn, J.)

court of appeals [15] further warrants review of the Colorado Supreme Court's decision.

II. By Virtue of the Decision Below, a Highest State Court, by a Divided Vote, has Decided a Federal Question of Substance not Heretofore Determined by this Court in a Manner Inconsistent in Principle with Decisions of this Court in Hale v. Henkel, 201 U.S. 43, Silverthorne Lumber Co. v. United States, 251 U.S. 385, and United States v. Dionisio, —— U.S. ——, 35 L Ed 2d 67.

Although this Court's decision last Term in *Gelbard* v. *United States,* 408 U.S. 41, expressly refrained from reaching the constitutional issue presented by the instant case.[16] the decision by the Colorado Supreme Court conflicts in principle with prior decisions of this Court.

In *Hale* v. *Henkel,* 201 U.S. 43, the Court recognized the standing of a *grand jury* witness to attack the validity, under the Fourth Amendment, of a *subpoena*

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[15] Other federal courts of appeals have indicated their agreement with the result reached by the Colorado Supreme Court although in each case, either the facts are distinguishable from those here or there is no consideration, in the court's opinion, of the constitutional issue. *Cali* v. *United States,* 464 F.2d 475 (1st Cir.); *United States* v. *Flood,* 394 F.2d 139, 141 (2d Cir.), *cert. denied,* 393 U.S. 855; *Truchinski* v. *United States,* 393 F.2d 627, 631-34 (8th Cir.), *cert. denied,* 393 U.S. 831; *United States* v. *Gelbard,* 443 F.2d 837 (9th Cir.), *reversed and remanded,* 408 U.S. 41.

[16] In *Gelbard* the Court held that a grand jury witness has a statutory defense to a contempt citation for refusing to answer questions, if the questions are based upon illegal electronic surveillance. The Court stated (408 U.S. at 45, n. 5):

> "In view of our disposition of these cases, we do not reach any of the constitutional issues tendered as to the right of a grand jury witness to rely upon the Fourth Amendment as a basis for refusing to answer questions."

duces tecum. Referring to the subpoena, the Court stated:

> "[A]n order for the production of books and papers may constitute an unreasonable search and seizure within the Fourth Amendment. . . . Applying the test of reasonableness to the present case, we think the *subpoena duces tecum* is far too sweeping in its terms to be regarded as reasonable. . . . A general subpoena of this description is equally indefensable as a search warrant would be if couched in similar terms." 201 U.S. at 76.

Another case involving grand jury subpoenas was *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385. In that case, the lower court had, upon an application for the return of governmentally-seized books and records, ordered them returned, agreeing that they had been seized in violation of the Fourth Amendment, but had then ordered the victim to produce the same material pursuant to a grand jury subpoena. Upon refusal to obey such subpoena and the lower court's production order, on Fourth Amendment grounds, Silverthorne was held in contempt. The Supreme Court (per Justice Holmes) reversed, stating:

> *"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all."* 251 U.S. at 392. (Emphasis added.)

"This language would logically appear to mean that the Fourth Amendment prevents the government from using illegally seized evidence as the basis for questioning aggrieved parties before a Grand Jury." *In re Egan, supra,* 450 F.2d at 211. The reasoning and rationale of *Silverthorne* have recently been affirmed

by this Court in *Harrison* v. *United States,* 392 U.S. 219, 222, 231.

In *United States* v. *Dionisio,* decided this Term, — U.S. —, 35 L Ed 2d 67, (January 22, 1973), the Court considered on the merits the Fourth Amendment claim of a grand jury witness adjudged in contempt for refusal to furnish voice exemplars for identification purposes. And while the Court rejected the claim,[17] the rationale is illuminating:

> "Since neither the summons to appear before the grand jury, nor its directive to make a voice recording, infringed upon any interest protected by the Fourth Amendment, there was no justification for requiring the grand jury to satisfy even the minimal requirements of 'reasonableness' imposed by the Court of Appeals. . . . Since Dionisio raised no *valid* Fourth Amendment claim, there is no more reason to require a preliminary showing of reasonableness here than there would be in the case of any witness who, despite the lack of any Constitutional or statutory privilege, declined to answer a question or comply with a grand jury request. Neither the Constitution nor our prior cases justify any *such* interference with grand jury proceedings." 35 L Ed 2d at 80. (Emphasis added.)[18]

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[17] on the ground that the Fourth Amendment provides no protection for what a person knowingly exposes to the public, i.e., his physical characteristics or his handwriting, inasmuch as no intrusion into an individual's privacy results from the exposure of such matters.

[18] While the Court referred to the need for broad grand jury investigative power (35 L Ed 2d at 79), and the concern at impeding such investigations (35 L Ed 2d at 81), it recognized the controls and limitations to which these interests are subject:

> "This is not to say that a grand jury subpoena is some talisman that dissolves all Constitutional protections. The

Implicitly, it would seem, had a *valid* Fourth Amendment claim been raised, Fourth Amendment reasonableness requirements would have had to be met before the grand jury would have been entitled to the evidence.

Thus, *Dionisio* appears to recognize the applicability of the exclusionary rule for valid Fourth Amendment claims raised in grand jury proceedings. The decision below by the Colorado Supreme Court is not in ac-

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grand jury cannot require a witness to testify against himself. It cannot require the production by a person of private books and records that would incriminate him. . . . The Fourth Amendment provides protection against a grand jury subpoena duces tecum tooo sweeping in its terms 'to be regarded as reasonable.' *Hale* v. *Henkel*, 201 U.S. 43, 76; cf. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186. And last Term, in the context of a First Amendment claim, we indicated that the Constitution could not toletrate the transformation of the grand jury into an instrument of oppression: '. . . Grand juries are subject to judicial control and subpoenas to motions to quash. We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.' *Branzburg* v. *Hayes*, 408 U.S. 665, 707-708. . . .

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"The grand jury may not always serve its historic role as a protective bulwark standing solidly between the ordinary citizen and an overzealous prosecutor, but if it is even to approach the proper performance of its constitutional mission, it must be free to pursue its investigations unhindered by external influence or supervision so long as it does not trench upon *the legitimate rights* of any witness called before it." 35 L Ed 2d at 78, 81. (Emphasis added.)

cord.[19] For this additional reason, review of that decision would be appropriate.[20]

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[19] Unlike the instant case, and *Calandra, supra,* neither *Hale, Silverthorne,* nor *Dionisio* involved witnesses offered immunity under the Fifth Amendment. But, just as the trustworthiness of evidence is irrelevant to its admissibility status under the Fourth Amendment, (*Davis* v. *Mississippi,* 394 U.S. 721, 724), so too is the immunity factor. "It is surely anomalous to say that the individual . . . is fully protected by the Fourth Amendment only when the individual is suspected of [or may be charged with] criminal behavior." *Camara* v. *Municipal Court,* 387 U.S. 523, 530. Whereas the Fifth Amendment is specifically directed to the criminal defendant, the Fourth Amendment is directed at the proscribed act itself. Society as a whole is protected and the victim of an illegal search and seizure is an appropriate representative of the larger interests as well as his own. And it is precisely because such representative may be granted immunity from further prosecution that society's interest in redress to reduce the incentive of the government to violate Fourth Amendment rights will not be vindicated unless this aggrieved party—with the necessary standing under *Alderman* v. *United States,* 394 U.S. 165—may raise the claim in the course of a grand jury proceeding. See *In re Egan, supra,* 450 F.2d at 213. One court has stated, "it is a truism that the deterrent is strengthened by extending the exclusionary rule to grand jury proceedings while they are in progress." *In re Shead,* 302 F. Supp. 569, 571 (N.D. Cal.), *affd, Carter* v. *United States,* 417 F.2d 384 (9th Cir.), *cert. denied,* 399 U.S. 935.

[20] As indicated by paragraph 2. of the "Questions Presented", *supra,* petitioner seeks consideration—as he did in the proceeding below—of alternative remedies to vindicate Fourth Amendment rights in the event it should be decided that the exclusionary rule does not apply and the suppression remedy is unavailable. Petitioner would argue that "in the context of electronic surveillance, it is unlikely that hearings such as requested here would become a major interference with efficient grand jury investigations" (see *supra,* pp. 12-13, 15-16 n. 14). As a last resort, in lieu of such "hearings", petitioner would request the immediate availability of the record in the wiretap authorization proceeding such as that which would otherwise be made available to him as a defendant in a subsequent contempt proceeding. At least, by this

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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June 1973

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remedy, the witness will more effectively be able to choose—upon advice of counsel—between testifying and being cited for contempt, without at the same time delaying the grand jury investigation.

Moreover, we would seek to show that relegation of petitioner to raising his claim in a contempt proceeding—a statutory remedy already recognized in *Gelbard, supra*—does not befit the Fourth Amendment privilege, unnecessarily negates the deterrence purpose thereof, and—by subjecting the witness to social stigma and "the revolving door which would bring him back here raising the same issues in a defense to a contempt citation" (*In re Calandra*, 332 F. Supp. 737, 739 (N.D. Ohio); Pet. in No. 72-734, p. 30)—result in unfairness and inefficiency.

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF COLORADO

GEORGE WESTERBERG, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED, *Petitioner*,

v.

THE DISTRICT COURT IN AND FOR THE SECOND JUDICIAL DISTRICT AND THE HONORABLE NEIL HORAN AND THE STATE GRAND JURY, *Respondents*.

25779

Original Proceeding

On consideration of the pleadings and arguments herein, it is hereby ordered that the rule to show cause heretofore issued in this action be, and it hereby is, discharged.
By the Court, February 20, 1973.

APPENDIX B

No. 25779

GEORGE WESTERBERG, individually and on behalf of others similarly situated, *Petitioner,*

v.

THE DISTRICT COURT in and for the SECOND JUDICIAL DISTRICT and the STATE GRAND JURY, *Respondents.*

February 20, 1973

Original Proceeding

En Banc — Rule Discharged

Mr. Justice Erickson delivered the Opinion of the Court.

This original proceeding arises out of the same factual setting that we dealt with in *People ex rel. Dunbar* v. *District Court,* ... Colo. ..., 500 P.2d 819 (1972). Briefs have been filed, and a record has been lodged which reflects the developments which have occurred since the case was last before us. We now deny the relief requested by the petitioner.

Certain grand jury witnesses have petitioned for a hearing on their claim that the court-approved wiretap which was used in the early investigative stages of this case was improperly and unlawfully obtained. These witnesses in his proceeding seek to avoid answering questions which may be based, in whole or in part, upon information obtained through the use of the court-approved wiretaps. In *People ex rel. Dunbar* v. *District Court, supra,* we held that the district court prematurely ordered a suppression hearing when the motion was made after a witness was under subpoena, but before the witness appeared, refused to testify, and was cited for contempt.

At this point in the present proceeding, the witnesses who seek relief on their motion to suppress have been granted immunity from prosecution, pursuant to the provisions of 1969 Perm. Supp., C.R.S. 1963, 154-1-18. Even though granted immunity, the witnesses refuse to testify and claim that the questions which have been asked are based upon information which was obtained by means of an illegal wiretap. The precise posture of this controversy is that the witnesses, in order to contest the legality of the wiretaps, seek discovery of the wiretap order which was issued by a Justice of this Court, together with the application and underlying affidavits which the Justice relied upon when he issued the wiretap order. The question before us is limited to search and seizure issues under the Fourth Amendment and does not involve self-incrimination under the Fifth Amendment. U.S. Const. amend. IV and amend. V; Colo. Const. art. II, § 7 and § 18. *See Kastigar* v. *United States,* 406 U.S. 441, 92 S.Ct. 1653, 31 L.Ed. 2d 212 (1972), and *Zicarelli* v. *New Jersey State Commission of Investigation,* 406 U.S. 472, 92 S.Ct. 1670, 32 L.Ed. 2d 234 (1972), for an analysis of the rights of the petitioner after he has been granted immunity from prosecution.

The witnesses claim that they should not be forced to risk contempt proceedings without a ruling on the legality of the electronic surveillance that preceded the grand jury investigation. In support of their position, the witnesses claim that they have the statutory right to discovery of the documents supporting the order, pursuant to 1971 Perm. Supp., C.R.S. 1963, 39-24-2(9). The Attorney General, in his answer, claims that the petitioners are again premature in their request for discovery of the material relating to the wiretap. He asserts that the petitioners can only obtain a hearing on the legality of the wiretap after they have been cited for contempt and seek to defend their contemptuous acts by showing the illegality of the investigation. *See Gelbard* v. *United States,* 408 U.S. 41, 92 S.Ct. 2357, 33 L.Ed.2d 179 (1972).

Constitutional issues are before us which involve the balancing of conflicting constitutional rights and procedures. The petitioners would have us look solely to the Fourth Amendment right of privacy and the right of every person to be protected against unreasonable searches and seizures. The Attorney General points to the function of the grand jury as a charging body and the need to grant the grand jury freedom in its investigation of crime. He contends that to require a suppression hearing when there has been a court-authorized wiretap, before a grand jury witness can be asked a question, would seriously impede the effective use of the grand jury.

In *Gelbard* v. *United States, supra,* the Supreme Court held that a grand jury witness in a federal contempt proceeding may raise the defense that the questions which were propounded to him were based on an unauthorized and illegal wiretap. The witnesses in the *Gelbard* case refused to answer questions which they claimed were based on illegal wiretaps and were thereupon cited for contempt. In *Gelbard,* the Supreme Court held that a witness could not be held in contempt under the provisions of 28 U.S.C. 1826(a) for refusing to answer a question which was based on information obtained by an unauthorized and illegal wiretap. In examining the issues, the Supreme Court dealt with the interpretation of the provisions of 18 U.S.C. 2510-2520 [also 3504]. The *Gelbard* decision did not explicitly reach the constitutional issues which are before us. The outside boundaries established by *Gelbard* are that discovery cannot be withheld after contempt proceedings have been instituted against a grand jury witness. The issue before us is narrower and is limited to the determination of whether discovery must be afforded prior to the time that the grand jury witness is cited for contempt.

Two Circuits have considered the question which we now face. The First Circuit has held that a motion to suppress is not available to a grand jury witness who challenges the

constitutionality of an investigative wiretap until after he is cited for contempt. *Cali* v. *United States*, 464 F.2d 475 (1st Cir. 1972). The result reached by the First Circuit is predicated on the fact that a grand jury cannot function efficiently if it is interrupted by lengthy suppression hearings. In judging the rights of a grand jury witness to an immediate hearing on his claim that a court-ordered wiretap was illegal against the need for efficient grand jury procedures, the First Circuit concluded that the requirement of the grand jury must take precedence.

The Sixth Circuit, however, did not find that a contempt citation was a necessary prerequisite to a motion to suppress and granted a grand jury witness the right to a hearing on his motion to suppress after he was subpoenaed and claimed that the questions which the grand jury propounded were based upon unlawful electronic surveillance. *United States* v. *Callandra*, 465 F.2d 1218 (6th Cir. 1972). The Sixth Circuit's opinion is based on the deterrence of unlawful electronic surveillance.

To us, the reasoning of the First Circuit is persuasive, and we are not swayed by the arguments which were made and sustained in the Sixth Circuit. A grand jury has long been a means for ferreting out crime and for providing the innocent with protection against unwarranted charges. To permit every witness who appears before a grand jury to file a motion to suppress and have it determined before he testifies would be to frustrate the grand jury process. Adequate protection is afforded the witness by the requirement that the court examine all the facts before imposing a contempt sanction.

Accordingly, the witness's claims are premature, and we, therefore, discharge the rule to show cause.

Mr. Chief Justice Pringle and Mr. Justice Day dissent.

Mr. Justice Groves does not participate.

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF COLORADO

25779

GEORGE WESTERBERG, individually and on behalf of others similarly situated, *Petitioner,*

v.

The District Court in and for the Second Judicial District and the Honorable Neil Horan and the State Grand Jury, *Respondents.*

Original Proceeding

On consideration of the petition of petitioner for rehearing in said cause, it is this day ordered that said petition be, and the same hereby is, denied.

By the Court. En Banc. March 12, 1973.

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF COLORADO

IN THE MATTER OF THE APPLICATION OF THE ATTORNEY GENERAL FOR AN EX-PARTE ORDER FOR WIRETAPPING CASE NUMBER ONE BEFORE MR. JUSTICE JAMES K. GROVES

Order

Pursuant to the provisions of 1969 Perm. Supp., C.R.S. 1963, 40-4-30, on January 6, 1971, the undersigned justice of the Colorado Supreme Court issued an electronic surveillance order, upon an application of the Attorney General of the State of Colorado. The order was in effect for a period of thirty days, commencing on January 6, 1971.

On February 5, 1971, the undersigned justice issued an extension order for electronic surveilance, upon an application of the Attorney General of the State of Colorado. The extension order was in effect for a period of thirty days. Communications through Denver, Colorado, telephones having numbers 936-5772, 777-1629 and 777-1819 were intercepted from January 18, 1971, until March 7, 1971, at 12:01 a.m.

IT IS HEREBY ORDERED that notice of the foregoing matters be given to the following:

Anthony C. Mulligan, also referred to as Anthony J. Mulligan, with residence at 2650 South Green Court, Denver, Colorado, and offices at 360 Acoma Street, Denver, Colorado

Mrs. Anthony J. Mulligan, whose residence is 2650 South Green Court, Denver, Colorado

George Westerberg with offices at 360 Acoma Street, Denver, Colorado

Helen G. McAbee whose office is at 360 Acoma Street, Denver, Colorado

IT IS FURTHER ORDERED that notice be given by serving each of the above named individuals personally with a copy of this order.

It is further ordered that James G. Jordan, an agent of the Colorado Bureau of Investigation, is hereby designated as the person to make service of such notices.

Done this 14th day of April, 1971.

s / James K. Groves
Justice, Colorado Supreme Court

I do hereby certify that the foregoing is a full, true and correct copy of that certain order issued by me on this 14th day of April, 1971.

Witness my hand and seal of the Supreme Court of the State of Colorado.

/s/ James K. Groves
Justice, Colorado Supreme Court

IN THE DISTRICT COURT
IN AND FOR THE CITY AND COUNTY OF DENVER
STATE OF COLORADO

IN THE MATTER OF THE STATE GRAND JURY

Motion to Suppress

COMES NOW each of the following persons; Paul Welch, Russel Sims, Lew Stone, Bob Lamping, Richard Dye, Roy Nylander, Leroy Gauthier, George E. Westerberg, Guy Van Portfliet, Anthony Mulligan, Ed Boetel, Al Ferguson, Oliver Nelson and Beatty, who are witnesses under subpoena issued by this Court and move this Court to direct the special prosecutor, appointed by the Attorney General or any witness, investigator or any other person not to disclose to the grand jury, refer to, or to direct any questions to any witness based upon information or evidence obtained from any wiretap, eavesdrop or electronic surveilance, or any information or evidence derived therefrom.

AS GROUNDS THEREFORE, IT IS STATED

1. That a certain order entered April 14, 1971 by Supreme Court Justice James K. Groves was served upon Anthony C. Mulligan and George Westerberg, witnesses named above, a copy of which is attached hereto as exhibit A.

2. That the Order purports to give notice to the parties named therein that certain unspecified electronic surveilance was conducted from January 6, 1971 and continuing for 30 days, and that thereafter the said electronic surveilance was extended on February 5, 1971 for an additional 30 days.

3. That based on the Order set forth in exhibit A each of the persons named above believe that the office and telephones of the Northern Colorado Building and Construc-

tion Trade Council were subjected to wiretap, electronic surveilance and eavesdrop.

4. That each of the persons named above have had reason to telephone or receive telephone calls from the offices of the said trade council or to visit the said offices during the time of the electronic surveilance and therefore have reason to believe that their communications have been intercepted and recorded without their knowledge or consent.

5. That office of the Attorney General has failed to comply the mandatory provisions of C.R.S. 1963, 40-4-30 (9) and that by reason thereof any such information may not be disclosed to the grand jury.

6. That in securing permission to conduct the electronic surveilance commencing on January 6, 1971, and permission to extend the surveilance for an additional 30 days commencing on February 5, 1971, the Attorney General failed to comply with the provisions C.R.S. 1963, 40-4-30 (2) and (6), thereby making the electronic surveilance unlawful.

7. That the Order of the Court authorizing the electronic surveilance beginning on January 6, 1971, and the extension thereof were not entered in accordance with C.R.S. 1963 40-4-30 (4), (5) and (6), thereby making the electronic surveilance unlawful.

8. That the electronic surveilance referred to in exhibit A violated the rights of each of the above named witnesses guaranteed by the Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States and Articles II, Section 7, Article II, Section 10, Article II, Section 18, and Article II, Section 25 of the Constitution of the State of Colorado.

9. That as witnesses before the Grand Jury, the petitioners may have no other opportunity to raise the issue

of the violation of their constitutional rights, and the other matters raised herein.

Respectfully submitted,

MacDonald & Fattor
By /s/ James Fattor
Attorneys for the Petitioners
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266-3841

IN THE DISTRICT COURT
IN AND FOR THE CITY AND COUNTY OF DENVER
STATE OF COLORADO

IN THE MATTER OF THE STATE GRAND JURY

Order

The Court having before it the motion of certain witnesses now under subpoena to appear before the above-captioned Grand Jury to produce certain petitions and orders authorizing electronic surveillance and the court having heard argument of counsel and being fully advised;

FINDS, that copies of said petitions and orders are necessary for a proper determination of the motions now before the Court, and it is therefore,

ORDERED that certified copies of the record in the proceedings entitled

> "In the Matter of the Application of the Attorney General for an ex parte Order for Wiretapping. Case Number One Before Mr. Justice James K. Groves".

be produced and made a part of these proceedings.

DONE & SIGNED this 16th day of May, 1972.

BY THE COURT:
/s/ Neil Horan, Judge

IN THE SUPREME COURT OF THE STATE OF COLORADO

THE PEOPLE OF THE STATE OF COLORADO EX REL.
DUKE W. DUNBAR, ATTORNEY GENERAL, *Petitioner*

VS.

THE DISTRICT COURT IN AND FOR THE SECOND JUDICIAL DISTRICT AND THE HONORABLE NEIL HORAN, CHIEF JUDGE THEREOF, *Respondents*

Petition

COME NOW the People of the State of Colorado, upon the relation of the Attorney General and petition this court to make and enter an order directing the respondent to show cause why the respondent should not be prohibited from conducting a hearing upon certain motions presently pending before the District Court in and for the Second Judicial District. As grounds for this petition it is averred as follows:

1. Pursuant to a petition filed by the Attorney General, a State Grand Jury was duly empanelled on May 1, 1972, by the Honorable Neil Horan, Chief Judge of the District Court in and for the Second Judicial District.

2. Subsequent to the empanelling of the State Grand Jury, subpoenas were served upon various witnesses in order to compel their attendance to give testimony before the State Grand Jury.

3. Upon being served with such subpoenas, certain witnesses filed various motions before the District Court on or about May 10, 1972, asserting that they have been subjected to wiretap surveillance conducted pursuant to orders of Supreme Court Justice James K. Groves, and requesting that the District Court afford them a hearing in order to determine whether the evidence obtained thereby should be suppressed and the Attorney General be prohibited from disclosing the contents of said wiretap to the State Grand

Jury and from questioning any of such witnesses based upon the evidence so derived. Copies of said motions are attached hereto and incorporated herein.

4. Upon the filing of said motions on or about May 10, 1972, the undersigned and counsel for the witnesses appeared before the Chief Judge at which time it was stipulated that wiretap surveillance was conducted pursuant to the orders of Justice Groves and, that during the period of the interception, communications of certain witnesses, namely George E. Westerberg, Guy Van Portfliet, Anthony Mulligan, and Oliver Nelson, were in fact overheard. The District Court then continued the matter for further hearing on May 16, 1972.

5. On May 16, 1972, the District Court conducted a hearing on the question of whether the witnesses had standing to challenge the sources of the People's evidence prior to appearing to testify before the State Grand Jury. At the conclusion of said hearing the Honorable Neil Horan ruled that the witnesses had such standing and entered an order for the production of the record pursuant to which the wiretap surveillance was conducted. The court further ordered that a hearing on the merits of the witnesses' motions be had on June 16, 1972, at 2 p.m. A transcript of said hearing and a copy of the order of the District Court are attached hereto and incorporated herein.

6. It is the People's position that the District Court is proceeding without, and in excess of its jurisdiction in entertaining a motion to suppress evidence filed by a witness before a grand jury. Neither the Fourth Amendment to the United States Constitution, Article II, Section 7 of the Colorado Constitution nor any statutory authority or rule of court can be said to confer upon such witnesses the right to litigate, prior to testifying before a grand jury, the question of the validity of a search and seizure conducted by electronic surveillance or otherwise.

7. Petitioner therefore urges that the District Court, in ordering a hearing into the validity of the electronic sur-

veillance, is acting without, and in excess of its jurisdiction. Moreover, unless the respondent court is prohibited from conducting such a hearing, it is reasonably anticipated that other witnesses to be subpoenaed before the State Grand Jury will join in the motions heretofore filed or will file separate but similar motions. If the District Court is allowed to proceed, it is likewise anticipated that motions to suppress evidence will be filed by other witnesses subpoenaed before the various county and special grand juries empanelled throughout the State of Colorado. Therefore, the issues presented by the instant matter are not isolated but constitute a matter of immediate public concern.

8. Petitioner is without an adequate and speedy remedy at law to test the propriety of the District Court's actions in ordering such a hearing and to prevent reapplication of the court's ruling in matters involving other witnesses before the State Grand Jury and witnesses before county and special grand juries throughout the State of Colorado. Unless the District Court is prohibited from proceeding with the hearing which has been ordered, it is submitted that the end result of the District Court's action will be constant disruption of grand jury investigations, unnecessary expense and delay, and a severe hampering of the grand jury as an investigative body.

9. For the foregoing reasons, petitioner respectfully requests this court to exercise its supervisory authority over the respondent court and accept jurisdiction of this case and to order the District Court to show cause as prayed above.

Respectfully submitted,

Duke W. Dunbar
Attorney General

By /s/ Richard T. Spriggs
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IN THE SUPREME COURT OF THE STATE OF COLORADO

THE PEOPLE OF THE STATE OF COLORADO EX REL. DUKE W. DUNBAR, ATTORNEY GENERAL, *Petitioner*,

v.

THE DISTRICT COURT IN AND FOR THE SECOND JUDICIAL DISTRICT AND THE HONORABLE NEIL HORAN, CHIEF JUDGE THEREOF, *Respondents*.

25584

Order

Upon consideration of the petition of the People of the State of Colorado Ex Rel the Attorney General of the State of Colorado for a show cause order, it is this day ordered that a rule to show cause issue out of this court commanding the respondent to answer in writing and show cause within fifteen days from service of such rule why the relief requested in the prayer of said petition should not be granted.

It is further ordered that the petitioner have fifteen days from receipt of the answer within which to reply.

It is further ordered that all proceedings herein be stayed until further order of this court.

BY THE COURT, EN BANC, June 8, 1972.

Mr. Justice Groves not participating.

IN THE SUPREME COURT OF THE STATE OF COLORADO

The People of the State of Colorado Ex Rel. Duke W. Dunbar, Attorney General, *Petitioner,*

v.

The District Court in and for the Second Judicial District and The Honorable Neil Horan, Chief Judge thereof, *Respondents.*

Original Proceeding

25584

On consideration of the pleadings and briefs filed herein, it is this day ordered, adjudged and decreed that the rule to show cause heretofore issued in this cause be, and it hereby is, made absolute. By the Court. En Banc. August 28, 1972.

No. 25584

THE PEOPLE OF THE STATE OF COLORADO EX REL. DUKE W. DUNBAR, ATTORNEY GENERAL, *Petitioner,*

v.

THE DISTRICT COURT IN AND FOR THE SECOND JUDICIAL DISTRICT AND THE HONORABLE NEIL HORAN, CHIEF JUDGE THEREOF, *Respondents.*

August 28, 1972

Original Proceeding

En Banc — Rule Made Absolute

Mr. Justice Erickson delivered the Opinion of the Court.

As part of an investigation of fires at construction sites, the Attorney General empaneled a state grand jury and subpoenaed certain witnesses. These witnesses answered that they had received the statutory notice of having been overheard subject to a wiretap authorized under 1971 Perm. Supp., C.R.S. 1963, 39-24-2. The witnesses then filed a motion in the district court for a hearing to determine the legality of the wiretap and to suppress the intercepted con-

versations. The district court granted the hearing. The Attorney General then sought a writ of prohibition from this Court to prevent the district court from holding a suppression hearing at this time. We issued a rule to show cause why the writ of prohibition should not be granted and now issue a writ of prohibition.

The Attorney General argues that no witnesses should be able to challenge any of the evidence before the grand jury. He contends that a suppression hearing of the type contemplated by the witnesses would destroy the effectiveness of the grand jury and would totally eliminate secrecy of grand jury proceedings if the investigation depended in any way upon evidence secured by wiretaps or electronic eavesdropping. The witnesses reply that the Colorado wiretap statute, 1971 Perm. Supp., C.R.S. 1963, 39-24-2 gives them a remedy of suppression in "any proceeding" and that important Fourth Amendment rights should be promptly vindicated. However, as the matter is presently postured, the issues raised are not subject to review. No witness has been questioned. No witness has refused to answer any question propounded to him by or before the grand jury. No witness has been cited for contempt. No charges have been filed against any witness. Furthermore, the wiretap in issue was only used after a court order was obtained. No showing has been made that the court order which permitted the electronic surveillance was invalid or was not properly followed. What these witnesses assert is a right to a hearing on a wiretap that *might* be illegal and to suppress intercepted contents that *might* be used in the future in some manner. Therefore, the order granting the witnesses a suppression hearing was premature under the circumstances.

Grand jury proceedings have been traditionally free of technical rules. *Lawn* v. *United States,* 355 U.S. 339, 78 S.Ct. 311, 2 L.Ed.2d 321 (1958). The remedy of exclusion of evidence or suppression has been held to apply to the trial once an indictment has been returned but has not been extended to the indictment. *Blue* v. *United States,* 384 U.S. 251, 86 S.Ct. 1416, 16 L.Ed.2d 510 (1966). *See also,*

Costello v. *United States,* 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956), which held that an indictment which was only supported by hearsay evidence did not constitute a due process violation. Under the federal statute, 18 U.S.C. 2515, the Supreme Court, in *Gelbard* v. *United States,* — U.S. —, — S.Ct. —, 33 L.Ed.2d 179 (June 26, 1972), permitted a grand jury witness cited for contempt under the provisions of 28 U.S.C. 1826(a) for refusal to answer questions based on intercepted telephone calls to question the legality of the interception in the defense of the contempt charge where there was no court order authorizing the interception (n. 22). As the case is presented to us, the facts do not fall within the parameters set out in the *Gelbard* case. Mr. Justice White, concurring in *Gelbard* v. *United States, supra,* commented on this very problem in the context of the federal statute:

> "Where the Government produces a court order for the interception, however, and the witness nevertheless demands a full blown suppression hearing to determine the legality of the order, there may be room for striking a different accommodation between the due functioning of the grand jury system and the federal wiretap statute. Suppression hearings in these circumstances would result in protracted interruption of grand jury proceedings. At the same time prosecutors and other officers who have been granted and relied on a court order for the interception would be subject to no liability under the statute, whether the order is valid or not; and in any event, the deterrent value of excluding the evidence will be marginal at best. . . ."

Accordingly, the witnesses are not entitled to a suppression hearing, and the district court is not to conduct a suppression hearing at this time.

The order to show cause is made absolute.

Mr. Chief Justice Pringle concurring in the result.

Mr. Justice Day and Mr. Justice Groves not participating.

IN THE SUPREME COURT OF THE STATE OF COLORADO

Motion for Discovery

IN THE MATTER OF THE APPLICATION OF THE ATTORNEY GENERAL FOR AN EX PARTE ORDER FOR WIRE-TAPPING CASE NUMBER ONE BEFORE JUSTICE JAMES K. GROVES

1. This motion is made for the following persons:

a. Anthony C. Mulligan, George Westerberg, and Helen McAbee. Pursuant to an order dated April 14, 1971, and signed by Justice Groves, each of these persons was notified that their conversations were intercepted by electronic surveillance by means of some electronic device on the telephones having the numbers 936-5772 and 777-1629 and 777-1819 during a period from January 18, 1971, to March 17, 1971.

b. Paul Welch, Russel Sims, Lew Stone, Bob Lamping, Richard Dye, Roy Nylander, Leroy Gauthier, Guy Van Portfliet, Ed Boetel, Al Ferguson, and Oliver Nelson, each of whom had on a number of occasions made calls to and received calls from the telephones numbered 777-1629 and 777-1819 during the time indicated above and therefore they have reason to believe that their private conversations were intercepted by agents of the state without their knowledge and consent.

2. This motion is made pursuant to 1969 Perm. Supp. CRS 1963, 40-3-30 (8) (d) (iv).

3. That the persons named in paragraph 1 move that Justice Groves make available to each of them through their attorneys the following:

a. Copy of the application of the Attorney General for the order authorizing the electronic surveillance and all affidavits, written documents, and a transcript of the testimony, if any, used to support the application.

b. A copy of the order authorizing the electronic surveillance beginning January 6, 1971.

c. A copy of the application of the Attorney General for an extension of the electronic surveillance from February 5, 1971, to March 7, 1971, and all affidavits, written documents, and a transcript of the testimony, if any, used in support of the application.

d. A copy of the order authorizing an extension of the electronic surveillance from February 5, 1971, to March 7, 1971.

e. A copy of the transcript of the intercepted communications.

f. An opportunity for counsel to hear the recording of the intercepted communications.

g. With respect to each recording, the dates the interception was made whether or not the interception was made by wire-tap on a telephone or by the use of some electronic surveillance device, and if by telephone wire-tap, an identification of the telephone being tapped, and if not by telephone wire-tap, an identification of the electronic device being used and where it was located and the person, if known, whose conversation is intercepted.

4. As grounds therefore, the movants state:

a. That although they have been advised that electronic surveillance was made pursuant to Court order, and that certain conversations were intercepted, they have not yet seen any order or the application in support thereof, and therefore have had no opportunity to determine whether or not the order was valid.

b. That the orders for surveillance were obtained *ex parte* and therefore have not been tested by an adversary proceeding.

c. That the movants have been subpoenaed before the Grand Jury and have reason to believe that questions put

to them were based upon information contained from the electronic surveillance.

d. That if the electronic surveillance conducted by the state was unlawful, either because the order was not properly obtained or because the surveillance was not conducted in accordance with the order, the movants have a right not to be compelled to answer questions based upon information directly or indirectly obtained from such unlawful electronic surveillance, such right being guaranteed by the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States and by Article II, Sections 7, 10, 18, and 25 of the Constitution of the State of Colorado.

e. That it is impossible for the movants to make an intelligent judgment as to whether the electronic surveillance was valid unless the information sought by them in this motion is made available to them.

f. That the interests of justice and due process to which the movants are entitled demand that the information sought in this motion be made available to them and their attorneys.

g. That these movants have previously filed a motion to suppress the wire-tap evidence on the grounds that the statute was not complied with and on the grounds that the wire-tap violated their constitutional rights. The Supreme Court, in Case Number 25584, decided August 28, 1972, ruled that the motion was premature; however, in the argument before the Supreme Court the Attorney General in his rebuttal argument advised the Supreme Court that the movants had a right to obtain a copy of the Order and Application by filing a motion for discovery of them pursuant to the statute referred to in paragraph 2 above.

5. This motion should be construed as a special appearance only for the purpose of presenting the motion in accord with the statute and the movants do not admit that

the Supreme Court or a Justice thereof has jurisdiction with regard to the application or order authorizing a wire-tap or electronic surveillance.

MacDonald & Fattor
By /s/ James Fattor
555 Capitol Life Center
Denver, Colorado 80203
266-3841

IN THE SUPREME COURT OF THE STATE OF COLORADO

Ruling on Motion for Discovery of Anthony C. Mulligan, et al Filed on September 6, 1972

The motion for discovery is denied.

By my order two sealed packages were delivered to the clerk of this court for safekeeping. One package contains the wiretap surveillance recordings made under orders previously entered in this matter. The other package is an envelope containing the following:

1. Application of the Attorney General for an ex-parte order for electronic surveillance dated January 5, 1971.

2. An affidavit attached to and supporting the said application.

3. An electronic surveillance order entered by me on January 5, 1971.

4. Eight reports as to the surveillance signed by the Deputy Attorney General.

5. Application for an extension of the surveillance order dated February 5, 1971.

6. Affiffidavit attached to and supporting the last mentioned application.

7. My order dated February 5, 1971, extending the order for electronic surveillance.

8. Affidavit dated April 14, 1971, containing information which might support a portion of my order of April 14, 1971, a copy of which was served upon some of the present movants.

9. The last mentioned order.

10. Proofs of service of copies of the order last mentioned, dated April 22, 1971.

I have some appreciation of the rather frustrating position in which the movants find themselves. Counsel for the movants cannot form their own opinion or seek a judicial determination as to whether there was probable cause for issuance of the surveillance order unless the contents of the application therefor and of the supporting affidavit are disclosed.

This motion has been filed solely under 1969 Perm. Supp., C.R.S. 1963, 40-4-30(8)(d)(iv), albeit the motion erroneously states 40-3-30(8)(d)(iv). This subsection of the statute provides that the granting or denial of a motion such as the one here is within the discretion of the judge. I am not unmindful that, all things being equal, the spirit of Crim. P. 16 suggests that such a motion be granted.

The Attorney General has objected to the granting of the motion for a number of reasons. Included among these reasons are that (1) "the disclosure of the information sought would potentially disclose the identity of a confidential informant and engender an unnecessary risk of retaliation against such persons (sic);" and (2) "the granting of the requested discovery at this time would serve to further hinder, obstruct and delay the investigation of the State Grand Jury." The undersigned finds that these two grounds are sound with respect to the request for disclosure of the original application for a wiretap surveillance order and for the disclosure of the affidavit supporting that application. The undersigned is acutely aware of the possibility that disclosure of the contents of the affidavit might result in retaliation against more than one person. The second reason is sound with respect to the request for discovery of the original surveillance order. The undersigned finds that the harm which might result from disclosure of the application, affidavit and order far outweighs the possible benefit of disclosure to the movants.

Without disclosure of the application, affidavit and order, no determination of probable cause can be made. The main

thrust of this motion to disclose is to provide movants with sufficient information for a determination of probable cause. While there may be some value to the movants in obtaining disclosure of the recorded conversations, this disclosure does not approach the importance of disclosure of the documents on which the finding of probable cause was based.

The eight reports relating to the surveillance purport to disclose statements made in the recorded conversations which were regarded as material to the surveillance order. Disclosure of these reports might hinder and obstruct the investigation of the Grand Jury, although to a lesser extent than is involved in the original application, affidavit and order.

I have concluded that, in the light of the fact that the movants have thus far been precluded from obtaining information as to probable cause, neither the eight reports nor the recordings themselves should be disclosed. The remaining documents in the sealed envelopes could be of little, if any, value to the movants.

In support of their motion for disclosure, the movants have cited *Gelbard* v. *United States,* 92 S.Ct. 2357, 33 L.Ed. 2d 179 (June 26, 1972), and *Alderman* v. *United States,* 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176. Neither of these cases require the granting of the instant motion.

There has not been any attempt to approach the question of remedies available to the movants either now or after further proceedings unfold.

Dated this 22nd day of September, 1972.

/s/ James K. Groves
Justice

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There has not been any attempt to approach the question of remedies available to the movants either now or after further proceedings unfold.

Dated this 22nd day of September, 1972.

/s/ James K. Groves
Justice

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1649

GEORGE WESTERBERG, Individually and on behalf of others similarly situated,

Petitioner,

vs.

THE DISTRICT COURT in and for the Second Judicial District, and the Honorable Neal Horan and the State Grand Jury,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF IN OPPOSITION

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IN THE

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF IN OPPOSITION

INTRODUCTORY STATEMENT

The respondents accept the petitioner's references and statements as to the opinion below,[1] jurisdiction, constitutional provisions involved, and statement of the case. However, the respondent desires to restate the questions presented.

[1] For additional background the Supreme Court is respectfully referred to the related opinion, **People ex rel Dunbar v. District Court,** —— **Colo.** ——, 500 P.2d 819 (1972).

QUESTIONS PRESENTED

1. Whether state grand jury witnesses who have been granted transactional immunity are entitled to invoke the exclusionary rule formulated under the Fourth and Fourteenth Amendments to the United States Constitution by moving to suppress wiretapping evidence obtained under authority of a court order issued pursuant to state law, before any showing that such order was invalid or that any constitutional rights have been violated?

2. Whether such state grand jury witnesses have a right of discovery prior to time that the witnesses are required to testify or risk being cited for contempt?

ARGUMENT IN OPPOSITION

The issues presented in this case are much more narrow than the questions set out above would apparently indicate. In essence we are not involved with any deprivation of constitutional rights, as intimated by petitioner, but rather at what point in time those rights are to be determined during a grand jury proceeding. In this case the state grand jury, the District Court Judge, the Colorado Supreme Court Justice who issued the surveillance order, and the Supreme Court of Colorado were all acutely sentitive to the constitutional rights of the petitioner as evidenced by their orders and opinions issued below. The issue before this Court is narrow, and in practical effect is limited to the determination of whether a motion to suppress or for discovery must be afforded a grand jury witness prior to the time that the witness either testifies or chooses to be cited for contempt. Such problem was alertly recognized by Mr. Justice White,

concurring in *Gelbard v. United States*, 408 U.S. 41 (1972), where he commented:

> "Where the Government produces a court order for interception, however, and the witness nevertheless demands a full blown suppression hearing to determine the legality of the order, there may be room for striking a different accommodation between the due functioning of the grand jury system and the federal wiretap statute. Suppression hearings in these circumstances would result in protracted interruption of grand jury proceedings. At the same time prosecutors and other officers who have been granted and relied on a court order for the interception would be subject to no liability under the statute, whether the order is valid or not; and in any event, the deterrent value of excluding the evidence will be marginal at best . . . ."

The respondents submit that petitioner is not entitled to a rule which would result in interminable delay, thwart the very functioning and efficacy of the grand jury process, and yet add nothing to the assurance that petitioner's constitutional rights would be any more sensitively considered and protected than they already have been in this case. See *Costello v. United States*, 350 U.S. 359 (1956).

I. THE DECISION BELOW IS CORRECT.

The petitioner urges this Court to grant a writ of certiorari on the ground that the decision of the Supreme Court of Colorado is in conflict with an opinion of the United States Court of Appeals for the Sixth Circuit[2] on a substantially similar issue. Since the same decision

[2] **United States v. Calandra**, 465 F.2d 1218 (6th Cir. 1972), *cert. granted* February 20, 1973, No. 72-734.

of the Supreme Court of Colorado is in accord upon a more identical issue with an opinion of the United States Court of Appeals for the First Circuit,[3] it would appear that the conflict constitutes a stand-off and petitioner's request for a writ should be denied as not coming within the scope of considerations characterized within United States Supreme Court Rule 19.

However, assuming some sincerity to petitioner's reasons for urging the grant of the writ, respondents nevertheless urge denial of the writ since the decision of the Supreme Court of Colorado is correct.

This Court extended the "exclusionary rule" to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961), and specifically referred to the conjunction of the Fourth and Fifth Amendments as the rationale for such exclusion in *Malloy v. Hogan*, 378 U.S. 1, 8 (1964) (Brennan, J.). Here the petitioner was granted transactional immunity and it would appear that he would have no standing to assert a right of suppression since he could not become a defendant in the usual sense. However, in *Gelbard, supra*, this Supreme Court, while expressly reserving the constitutional issue here presented, held that a grand jury witness in a federal contempt proceeding may raise the defense that the questions which were propounded to him where based upon an unauthorized and illegal wiretap. The Supreme Court of Colorado, in this case below, recognized that the outside boundaries established by *Gelbard* were that "discovery" could not be withheld after contempt proceedings had been instituted against a grand jury witness. In determining the question at what point in time a grand jury witness will be afforded dis-

[3] **Cali v. United States**, 464 F.2d 475 (1st Cir. 1972). In *accord*, United States v. Flood, 394 F.2d 139 (2d Cir. 1968), *cert. denied*, 393 U.S. 855. See also, Truchinski v. United States, 393 F.2d 627, 631-34 (8th Cir. 1968), *cert. denied*, 393 U.S. 831.

covery, the court opted for the reasoning in *Cali, supra,* which concluded that the proper functioning of the grand jury must take precedence, and that whatever rights a grand jury witness may have in defense to a contempt proceeding, he may not *anticipate* such a proceeding by prematurely bringing a motion to suppress evidence before the grand jury.

Whatever merits the *Calandra, supra,* decision may have in this regard, it is emphasized that the rights of the defendant in that case were considered to have been clearly violated by an illegal search and seizure. In the case *sub judice,* the wiretap in issue was obtained only after a court order was issued pursuant to state law, and since no showing has been made that the surveillance order was invalid or not properly executed, it is presumptively valid.

Hence, the Colorado state decision is not only correct, but it is in accord with *Cali, supra,* and is distinguishable from *Calandra, supra.*

II. THE DECISION BELOW IS NOT INCONSISTENT IN PRINCIPLE WITH PREVIOUS DECISIONS OF THIS COURT.

The petitioner states that although this Court, in *Gelbard v. United States,* 408 U.S. 41 (1972), expressly refrained from reaching the constitutional issue presented by the instant case, the decision by the Supreme Court of Colorado conflicts in principle with prior decisions of this Court, citing *Hale v. Henkel,* 201 U.S. 43 (1906), *Silverthorne Lumber Co. v. United States,* 251 U.S. 385 (1920), and *United States v. Dionisio,* —— U.S. ——, 35 L.Ed.2d 67 (1973).

At the outset it is emphasized that unlike the case under consideration, neither *Hale, Silverthorne,* nor *Dionisio* involved witnesses who had been offered specific grants of immunity from prosecution to fully protect Fifth Amendment rights. While agreeing with such distinction, the petitioner opines that such distinction is irrelevant, indicating that it would be anomalous to say that an individual is fully protected by the Fourth Amendment only when he is suspected of or charged with criminal behavior. Such rationalization fails to appreciate the especial uniqueness of grand jury proceedings. Grand juries are generally free from technical rules, act in secret, and have extra-ordinary powers which even permit them to pierce the Fifth Amendment shield by grants of immunity from prosecution. See *Hale v. Henkel, supra,* and *Costello v. United States, supra.*

Respondents admit to the validity of the basic principle that victims of unconstitutional practices should be entitled to an effective remedy. However, in the more obviously pertinent case of *Silverthorne,* the constitutional violation was a *fait accompli* and the constitutional breach was admitted by the government. Such is not the case below; here petitioner was subject to electronic surveillance in accordance with a valid court order issued pursuant to state law, and respondents deny any illegality as to such surveillance. Hence, Justice Holmes' injunction in *Silverthorne* forbidding the use of illegally obtained evidence "not [only] before the Court, but that it shall not be used at all" (251 U.S. at 392) is not pertinent to the situation in this case since the question of illegality is *premature,* as was recognized in *Cali, supra,* and by the Supreme Court of Colorado here. This is not to say that the petitioner is to be denied his day in court to question such legality, but rather to question his timing. As in

Hale, Silverthorne, and *Dionisio,* the petitioner will be able to assert his rights and thereby be afforded a remedy during the contempt proceeding should the circumstances so evolve.

Respondents are not, and were not, insensitive to the Fourth Amendment rights of the petitioner. Their position and actions have recognized the necessity of protecting Fourth Amendment rights as they may apply to electronic surveillance of a grand jury witness, and such actions were in accord with the dictates, as differentiated from the dicta, of *Hale, Silverthorne, Dionisio,* and *Gelbard.* The Supreme Court of Colorado, in the decision at issue, concluded that to determine these rights before the grand jury investigation would frustrate the processes of that body, and further concluded that adequate protection is afforded the witness by the requirement that the court examine all the facts during the contempt proceeding.

Such procedure was evidently considered adequate protection by this Court in *Gelbard, supra,* as well as in the very cases cited by petitioner, viz. *Hale, Silverthorne,* and *Dionisio.*

Hence, the Colorado state decision below is in accord with the principles and procedures sanctioned by previous decisions of this Supreme Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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